In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-233

THE COMMONWEALTH OF MASSACHUSETTS, et al.,
APPELLANTS

v.

HELEN B. FEENEY
APPELLEE

On Appeal from the United States District Court for the District of Massachusetts

BRIEF OF THE AMERICAN LEGION, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

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BRIEF OF THE AMERICAN LEGION, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

Amicus has received and filed with the Clerk of this Court letters from counsel for Appellant and Appellee consenting to the filing of this Brief in support of Appellant.

Interest of Amicus

This brief is filed because the American Legion, as the representative of American veterans of war, has a vital interest in the outcome of litigation which may cost its members the benefits accorded them by the veteran's preference statute.

Statement of the Case

The amicus adopts the statement of the appellant.

Question Presented

1. Does the Veteran's Preference Statute, Mass. Gen. Laws ch. 31, §23, violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

Argument

I. An Intent To Discriminate Must Be Proven In Order To Demonstrate A Violation Of The Equal Protection Clause.

This Court, in *Washington v. Davis,* 426 U.S. 229 (1976), clearly rejected the proposition that disproportionate impact on a class constitutes a violation of the equal protection clause. The action considered there was deemed to be facially neutral. Here, the challenged statute was held by the dissent and the concurring opinion, at least as an initial case, to be neutral on its face. *Feeney v. Massachusetts,* 451 F. Supp. 143, 152. (D. Mass. 1978) (Murray, D.J., dissenting); *id.* at 150 (Campbell, C.J., concurring.) Judge Tauro disagrees. *Id.* at 146-147. Examination of the statutory language demonstrates that the statute is not gender-based, but draws a distinction based only on past military service. Mass. Gen. Laws ch. 31, §§21-25. As Judge Murray recognized, "[t]he attempted distinction between the test in *Davis* and the statute here is totally unconvincing: one is no more neutral than the other. In each case the classification is facially neutral . . . ." *Id.* at 153 (Murray, D.J., dissenting). *See also Geduldig v. Aiello,* 417 U.S. 484 (1974) (classification based on pregnancy is not gender-based).

Since the statute is facially neutral, proof of a discriminatory purpose is necessary to demonstrate an equal protection violation. *Washington v. Davis,* 426 U.S. at 245. In this case, the plaintiff has the burden of demonstrating that in establishing and maintaining the veterans' preference statute, the Massachusetts legislature was at least in part motivated by a purpose to disadvantage women. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265-266 (1977). The record developed in the lower court and discussed hereafter below demonstrates that the plaintiff has not met this burden, and the lower court erred in ruling in her favor.

II. The Lower Court Applied an Incorrect Standard By Inferring Intent From the Evidence Presented.

A. *The Lower Court Erred In Its Reliance Upon a Foreseeable Consequences Test To Determine Intent To Discriminate.*

The lower court[1] in part based its inference of intent to discriminate on the principle that one is presumed[2] or deemed[3] to intend the foreseeable consequences of actions taken.[4]

Although this question has not been specifically addressed by this Court, its application of the standard announced in *Washington v. Davis* indicates that such an inference of "intent" was not contemplated. In the *Arlington Heights* case, the zoning board's decision had the inevitable effect of foreclosing the opportunities for racially integrated housing in the village. Not only was this a foreseeable consequence; it was an openly discussed and foreseen consequence. *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 425 U.S. 252, 257-258 (1977). Despite these facts, this Court refused to infer a discriminatory intent, but found the other reasons put forward by the village ex-

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[1] *Feeney v. Massachusetts,* 451 F. Supp. 143. (D. Mass. 1978).

[2] *Id.* at 146.

[3] *Id.* at 147 n.7.

[4] Several Courts of Appeal have applied a similar rule to infer segregative intent in the context of school desegregation suits. *United States v. Board of School Commissioners,* 573 F.2d 400 (7th Cir. 1978); *Arthur v. Nyquist,* 573 F.2d 134 (2nd Cir. 1978) (appeal pending); *United States v. Texas Education Agency,* 579 F.2d 910 (5th Cir. 1978); *United States v. School District of Omaha,* 565 F.2d 127 (8th Cir. 1977), *cert. den.,* 434 U.S. 1064 (1978); *N.A.A.C.P. v. Lansing Board of Education,* 559 F.2d 1042 (6th Cir. 1977); *cert. den.,* 434 U.S. 997 (1977). The cases all are inapposite; the context of racial segregation in the schools is distinguishable not only because sex classifications have never been subject to the same degree of scrutiny as racial classifications, but also because of the deference accorded legislative decisions and the particular federal-state relationship involved in this case. *See* discussion at Part IIA, *infra.* However, some of the same arguments suggesting that the use of a foreseeable consequences standard is erroneous in this case would be applicable in that context as well.

plaining the decision to be a sufficient basis for that decision. *Id.* at 269-270.

In *Regents of the University of California v. Bakke,* 98 S.Ct. 2733 (1978), a majority of this Court again indicated that a foreseeable effect was an insufficient basis upon which to infer discriminatory intent. In establishing that race could be a factor considered in medical school admissions procedures, the majority made a distinction between discrimination which is illegally, invidiously motivated and that which is based on remedial or compensatory motives. Thus, Justice Powell based his willingness to allow consideration of race as a factor on the good faith which he presumed motivated the admissions committee. *Id.* at 2763 (Powell, J.). Similarly, the four Justices who concurred in this part of the Court's judgment relied upon *Arlington Heights* in commenting that although admissions preferences might have a disproportionate adverse impact on, for example, German-American applicants, such impact would not support a constitutional claim "unless they could prove that [the admissions committee] intended invidiously to discriminate against German-Americans." *Id.* at 2784 n. 35 (concurring and dissenting opinion). Given the limited number of places for the large number of applicants, it was foreseeable that giving special consideration to one class would have an adverse impact on the chances of applicants not members of the class. A foreseeable consequences test would fail to distinguish between "good faith" and "invidious" motives for taking those actions and, therefore, would not be consistent with the rationale of *Bakke.*

The use of a foreseeable consequences test to determine *legislative* intent to discriminate is particularly inappropriate. This Court noted in *Arlington Heights,* 429 U.S. at 265-266, that it is difficult to determine the intentions of a legislative or administrative body. As developed in civil and criminal contexts, the foreseeable consequences test is used to determine the intent of natural persons; the inference is permissible when applied to natural persons because it is

rationally based upon common experience. *See generally Tot v. United States,* 319 U.S. 463, 467-468 (1943). When extended to legislative action, there is no such justification. To apply the standard to the legislature would stifle legislative creativity and would be entirely contrary to the traditional deference given legislative discretion and wisdom. As Judge Murray noted in his dissenting opinion in *Feeney,* ". . . considerations of federalism require that an impermissible motive in enacting state legislation be not lightly inferred." 451 F. Supp. at 155. Especially in areas relating to such distinctly state concerns as public employment, the courts must defer to the wishes and experience of the state legislature.[5] If the law required legislators to ensure that its decisions would have no effect which burdened one group more than another, it would severely undermine legislative discretion.

Even if the Court rules that the legislature's ability to foresee adverse effects permits a presumption of intent to discriminate under some circumstances, such a presumption is inappropriate where the adverse effects are beyond the control of the state. The veterans' preference statute on its face does not draw a line between men and women; it draws the line between veterans and non-veterans. The fact that this classification does result in a disproportionate impact on women is caused completely by factors outside the control of the Massachusetts state government. It is the

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[5] *See National League of Cities v. Usery,* 426 U.S. 833 (1976) [special deference to matters relating to areas of state sovereignty such as public employment.] *See generally Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976) *(per curiam); City of New Orleans v. Dukes,* 427 U.S. 297 (1976) *(per curiam); Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955); *Anthony v. Massachusetts,* 415 F. Supp. 485, 502-503 (D. Mass. 1976) (Murray, D.J. dissenting), *vac'd and rem'd,* 434 U.S. 884 (1977).

Several veterans' preference cases especially note the prerogative of state legislatures in this area. *Rios v. Dillman,* 499 F.2d 329 (5th Cir. 1974); *Koelfgen v. Jackson,* 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.,* 410 U.S. 976 (1973); *McNamara v. Director of Civil Service,* 330 Mass. 22 (1953); Opinion of the Justices, 166 Mass. 594 (1896); *Hutcheson v. Director of Civil Service,* 361 Mass. 480 (1972). Cases involving alleged gender discrimination under the equal protection clause also specifically discuss the unique ability and prerogative of the legislature. *Kahn v. Shevin,* 416 U.S. 351 (1974); *Geduldig v. Aiello,* 417 U.S. 484 (1974).

federal government which placed whatever barriers may have existed against the entry of women into the armed services and against their participation in active combat; it was and is beyond the control or power of Massachusetts to change these barriers, as matters concerning the national defense are the exclusive province of the federal government.

A similar contention was confronted by this Court in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), where the plaintiff, a resident alien of the United States, claimed that a company policy against employment of aliens constituted a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et. seq., as discrimination on the basis of national origin. The Court rejected the plaintiff's contention that the prohibition against discrimination on the basis of national origin included a prohibition against distinctions made on the basis of citizenship. The Court also rejected the plaintiff's argument that discrimination on the basis of citizenship had the effect of discrimination on the basis of national origin. Of particular relevance here is the Court's comment in response to this argument:

> It is suggested that a refusal to hire an alien always disadvantages that person because of the country of his birth. A person born in the United States, the argument goes, automatically obtains citizenship at birth, while those born elsewhere can acquire citizenship only through a long and sometimes difficult process. . . . The answer to this argument is that *it is not the employer who places the burdens of naturalization on those born outside the country, but Congress itself,* through laws enacted pursuant to its constitutional power "[t]o establish an uniform Rule of Naturalization." U.S. Const., art. I, §8, cl. 4.

Id. at 93-94 n.6 (emphasis added) (citations omitted). The Court reasoned that since the employer was not responsible for establishing the burdens which caused the disproportionate impact, the employer could not be held to be discriminating by its use of a policy with a foreseeable adverse impact on those born outside the United States.

This principle is equally applicable here. If a preference for veterans results in an adverse impact on women, it is not the state which placed this burden on women, but the federal government acting pursuant to its constitutional power to raise armies and generally provide for the national defense. U.S. Const. art. I, §8, cl. 1, 12. The foreseeability of that impact cannot be held against the state or against the veterans who have served their country.

B. *It Was Error for the Lower Court to Consider on the Issue of Discriminatory Intent a Lack of Relationship Between Job Performance and the Preference.*

One of the factors considered by Judge Tauro as part of the totality of circumstances relevant to discriminatory intent was that the veterans' preference was not related to performance on the job.[6] The majority opinion does not articulate how this lack of relationship is relevant to discriminatory intent. It is true that the *presence* of a relationship between a classification and job performance would be relevant to show *lack* of discriminatory intent. It is also true that if the only purpose to be served by legislation was the highest quality of job performance, then the absence of a relationship between a classification and job performance would demonstrate that the legislature must have some improper motive such as an intention to discriminate. In this case it is conceded that the statutory preference was not designed merely to advance the goal of obtaining the best job performance. As the dissent forcefully points out, there are other desirable legislative goals including encouragement of enlistment. 451 F. Supp. at 152-156. The majority itself recognizes the worthy nature of the prime legislative motive of the challenged statute i.e., rewarding service in the military. 451 F. Supp. at 145. Since other legitimate motives to enact the veterans' statutes are conceded, the

[6] The dissent notes that this contention is open to dispute, 451 F. Supp. at 154.

lack of relationship of the preference to job performance does not justify the inference of discriminatory intent. It was therefore error for the lower court to consider such a factor on the issue of intent.

C. *The Evidence of Discriminatory Impact Alone Cannot Support A Finding of Intent to Discriminate.*

The finding of discriminatory impact, although concededly probative of intent to discriminate, cannot alone support a claim that the equal protection clause has been violated. *Washington v. Davis,* 426 U.S. 229 (1976). Because there is no other evidence which proves an intent to discriminate, the lower court's reliance on the evidence of disproportionate impact cannot sustain its finding of discriminatory intent.

D. *The Totality of the Circumstances Surrounding the Veteran's Preference Statute Demonstrates that the Lower Court's Inference of Discriminatory Intent was Erroneous.*

The above analysis demonstrates that there is no evidence adequate to support the inference that there was a discriminatory intent behind the veterans' preference statute. In addition, the totality of the circumstances indicates the legislature's continued efforts to maintain the constitutionality of that statute. The evidence clearly demonstrates a non-discriminatory, legitimate policy behind the statute. The lower court admitted the praiseworthy purpose of the statute in its original opinion in this case:

> Clearly, the rewarding of those who have rendered public service as members of the military is a worthy state purpose. . . . The modern Veterans' Preference Statute has its roots in legislation enacted in the seventeenth century and represents a key phase of the Commonwealth's continuing efforts on behalf of veterans. The program is designed to encourage service in the armed services, reward those whose lives have been disrupted because they have served, and provide assistance during the sometimes uneasy transition from military to civilian life.

Anthony v. Massachusetts, 415 F. Supp. 485, 496 (footnotes omitted).

Preferences and benefits to veterans in the areas of education, health care, housing and public employment, among others, have long been recognized as worthwhile endeavors of government.[7] In the area of public employment alone, the federal government, every state[8] and some municipalities[9] provide some form of preference to veterans. These preferences concern the hiring, promotion or layoffs of veterans in public employment — or some combination of all three.

Moreover, other courts which have considered different forms of veterans' preferences articulate similar reasons of encouraging patriotism, rewarding and compensating for the disruption of military duty, rehabilitation and recognition of job qualifications acquired in military service.[10] Each of the cases noted have either directly or indirectly overruled challenges to veterans' public employment preference statutes.

The history of the veterans' preference thus indicates a strong public policy supporting recognition of the services of our veterans and encouraging future military participation by members of both sexes. There is nothing in this his-

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[7] Kimbrough and Glen, *American Law of Veterans,* 1177-1238 (2d ed. 1954); House Comm. on Veterans' Affairs, State Veterans' Laws, H.R. Comm. Print No. 116, 93rd Cong., 2d Sess. (1974).

[8] *Id.*

[9] *See e.g. Rios v. Dillman,* 499 F.2d 329 (5th Cir. 1974) (El Paso, Texas).

[10] Prior versions of the Massachusetts Veterans' Preference Statute have been rationalized in the following cases: *Stevens v. Campbell,* 332 F.Supp. 102 (D. Mass. 1971); *Brown v. Russell,* 166 Mass. 14 (1896); Opinion of the Justices, 166 Mass. 594 (1896); *Mayor of Lynn v. Commissioner of Civil Service,* 269 Mass. 410 (1929); *McNamara v. Director of Civil Service,* 330 Mass. 22 (1953); *Hutcheson v. Director of Civil Service,* 361 Mass. 480 (1972). *See also Mitchell v. Cohen,* 333 U.S. 411 (1948); *Koelfgen v. Jackson,* 355 F.Supp. 243 (D. Minn. 1972), *aff'd. mem.,* 410 U.S. 976 (1973); *August v. Bronstein,* 369 F.Supp. 190 (S.D.N.Y.), *aff'd. mem.,* 417 U.S. 901 (1974); *White v. Gates,* 253 F.2d 868 (D.C. Cir.) *cert. den.,* 356 U.S. 973 (1958); *Russell v. Hodges,* 470 F.2d 212 (2d Cir. 1972); *Rios v. Dillman,* 499 F.2d 329 (5th Cir. 1974); *Koch v. Yunich,* 533 F.2d 80 (2d Cir. 1976); *Carter v. Gallagher,* 337 F.Supp. 626 (D. Minn. 1971); *Feinerman v. Jones,* 356 F.Supp. 252 (M.D. Pa. 1973); *Branch v. DuBois,* 418 F.Supp. 1128 (N.D. Ill. 1976).

tory which indicates that the preference was even in part a pretext for disadvantaging women.

Moreover, the historical development of the statute reveals the continuing affirmative steps taken by the Massachusets legislature to conform the statute with changing constitutional standards.[11] The legislative development indicates both the high public purpose which the legislature considers such preference to have and also of its resolve to preserve a constitutional statute. This demonstrated sensitivity to constitutional issues on the part of the Massachusetts legislature negates any inference that that body ever intended any discriminatory effect from its veterans' preference statute.

Thus, the lower court's inference of intent to discriminate is not justified by the totality of the circumstances, nor by any specific evidence pointing to a discriminatory intent.

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[11] For example, chapter 501, §2 of the Acts of the Massachusetts legislature for 1895 provided that upon application for a civil service position and certification as a veteran, an individual was, without examination, to be placed first on the eligible list certified by the civil service commissioners for that position. *Brown v. Russell*, 166 Mass. 14 (1896), held that §2, insofar as it purported absolutely to give veterans particular and exclusive privileges, was not constitutional. That decision was rendered on April 25, 1896. No later than June 20, 1896, the Governor and Council of the Commonwealth requested the Supreme Judicial Court for an advisory opinion on the constitutionality of legislation already passed to remedy the infirmities of the Veterans' Preference Statute raised in *Brown v. Russell*.

More recently, the Supreme Judicial Court struck down that portion of the Veterans' Preference Statute which gave an absolute right for appointment to vacant civil service positions to disabled veterans who had successfully completed the civil service examination. *Hutcheson v. Director of Civil Service*, 361 Mass. 480 (1972). That case was filed with the Suffolk Superior Court on May 11, 1971 and the trial judge issued a Reservation and Report decision on July 2, 1971. Equity Docket No. 93429. While the case was being considered by the Supreme Judicial Court, the Massachusetts legislature passed an amendment to the Statute which removed the mandatory appointment language. Act of November 11, 1971, ch. 1051, 1971 Mass. Acts 1001. The amendment had an emergency declaration which was signed by the Governor on November 15, 1971 so that the act went immediately into effect.

In 1977, the legislature again displayed its sensitivity to constitutional standards. Subsequent to the passage of the Equal Rights Amendment to the Massachusetts Constitution, Mass. Const. pt. 1, art. 1 (1780, amended 1976), the legislature amended Mass. Gen. Laws ch. 31 §§23B, 24 to include only gender-neutral characterizations, e.g. "surviving spouse" instead of "widow." 1977 Mass. Adv. Legis. Serv. c. 815, §§1, 2.

That incorrect inference is the consequence of the lower court's incorrect interpretation of the intent test defined in *Washington v. Davis* and *Arlington Heights*.

III. Since the Classification Imposed is Neither "Suspect" nor An Infringement of a Fundamental Right, the Applicable Constitutional Test is Whether There is a "Rational Basis" for the Legislative Classification, A Basis Which Clearly Exists Here.

Both *Washington v. Davis* and *Arlington Heights* recognize that proof of discriminatory intent does not conclusively establish unconstitutionality.[12] The fundamental question remains, does the challenged statute meet the applicable standard of review?

Because the statute discriminates only between veterans and non-veterans, the standard of review is only that of a rational relationship between the statute and its purpose.[13] There is no fundamental right involved;[14] nor does the statute create a suspect classification.[15] It does not even constitute a clasification based on sex because the classes created by the statute, i.e., veterans and non-veterans, both include men and women in their numbers.[16]

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[12] *Washington v. Davis*, 426 U.S. at 241; *Arlington Heights*, 429 U.S. at 270 n.21.

[13] Each member of the three-judge District Court panel which first heard this case agreed and acknowledged that, on its face, the Statute was not gender-based. *Anthony v. Massachusetts*, 415 F.Supp. 485 (D. Mass. 1976), *vac'd and rem'd*, 434 U.S. 884 (1977).

[14] *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) *(per curiam)* [no fundamental right to public employment]. Several veterans' preference cases have held that public employment is not a fundamental right which would trigger a review of strict scrutiny. *Koelfgen v. Jackson*, 335 F.Supp. 243, 250-251 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973); *Feinerman v. Jones*, 356 F. Supp. 252, 258 (M.D. Pa. 1973).

[15] A statute, neutral on its face, which allegedly affects one sex more adversely than the other does not create a suspect classification. *See Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976). *See also General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

[16] *See Geduldig v. Aiello*, 417 U.S. 484 (1974); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) [construing Title VII of the Civil Rights Act of 1964]. In both these cases, the Court considered classifications based on pregnancy as non-gender based. *A fortiori*, a statute which creates classes containing both men and women does not create gender-based classifications.

As conceded by the lower court, the primary and worthy motive behind the veterans' preference statute was a desire to reward those who had devoted time to active combat participation in the military service.[17] The legislature's decision to implement that goal by providing an advantage to veterans interested in public employment is well-suited and rationally related to the purpose of the statute. Since the preference does not guarantee public employment to all veterans regardless of competency nor absolutely deny non-veterans opportunities for employment in the civil service, it is not excessive but reasonably tailored to serve the statutory purpose. Therefore, there is a clear rational basis for the legislative classification adequate to withstand the scrutiny of this Court.

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[17] 451 F.Supp. at 145. *See also* 451 F.Supp. at 155-156 (Murray, D.J., dissenting). *See also* the discussion in Part II D of the Brief.

Conclusion

The judgment should be reversed.

Respectfully submitted,

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